



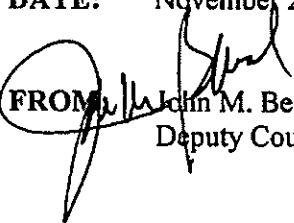
# MEMORANDUM

## Public Works Administration



DATE: November 21, 2007

TO: CIP Department Directors  
(See distribution below)

FROM:  John M. Bernal  
Deputy County Administrator

RE: Corps of Engineers – 404 Permits

As we discussed on November 20, 2007, all Public Works Departments with CIP projects are being negatively impacted, or will be impacted, by the Corps of Engineers' inaction on Jurisdictional Delineation requests. The CIP organizational unit will identify the potentially impacted projects that are in this fiscal year's program and they will estimate the probable delay in expenditures resulting from this circumstance.

In an effort to be as united as possible in our efforts to address this troublesome regulatory restraint, we must proceed in a coordinated manner. As such, we will adhere to the suggestions proposed by the County Attorney's office, in particular by Harlan Agnew, that are as follows:

- 1) All Pima County departments advancing projects requiring, or potentially requiring, 404 permits will submit Jurisdictional Delineation requests using the Colorado River as the Traditionally Navigable Water (TNW) and present the argument that there is no significant nexus to a TNW. If our argument is successful, no nexus to a TNW would result, the Corps would not have jurisdiction, and no permit would be required. At least one or two projects will be submitted to the Corps at the earliest possible date using this approach to solicit a response from the regulatory reviewers.
- 2) Concurrent with the action in number 1, Pima County will submit comments to the Corps guidelines by the deadline date of December 5, 2007. Harlan Agnew will be responsible for consolidating comments from the various departments and I will sign the comment letter prepared by Harlan on behalf of Pima County.
- 3) We will expend whatever efforts are necessary to prompt a response from the Corps to our submittals in item 1 above. If we are not successful in securing a timely response, we will immediately offer to adhere to all mitigation measures that would be required as if the Corps had jurisdiction.
- 4) If the Corps and EPA refuse to allow us to proceed as outlined in number 3 above, we will consider the filing of an appropriate legal action to allow us to proceed with our projects while this matter continues to be resolved through the Corps rule-making process.

Please be sure to distribute this memorandum to your project management staff and assure consistency in our application approach. If you, or your staff, have any questions, please do not hesitate to contact me.

JMB: smw

**Distribution:**

Ursula Kramer, Environmental Quality Director  
Rafael Payan, Natural Resources, Parks & Recreation Director  
Priscilla Cornelio, Transportation Director  
Mike Gritzuk, Regional Wastewater Reclamation Director  
Suzanne Shields, Regional Flood Control District

Cc: C.H. Huckelberry, County Administrator  
Mike Tuinstra, Facilities Management Director  
Nanette Slusser, Assistant County Administrator  
Don Spiece, CIP Manager, PWA  
Chris Straub, Chief Civil Deputy County Attorney  
Harlan Agnew, Deputy County Attorney



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

March 13, 2008

John M. Bernal  
Deputy County Administrator - Public Works  
Pima County  
130 W. Congress Street, 10th floor  
Tucson, Arizona 85701

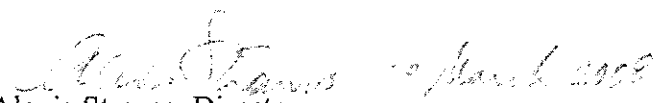
Dear Administrator Bernal:

Thank you for your February 11, 2008 email transmitting Pima County Department of Public Work's Memorandum regarding the impact of the Clean Water Act Section 404 permitting process on public works projects in Arizona. EPA Region IX recognizes the challenges facing the regulated public as a result of the issues associated with Clean Water Act jurisdiction following the Supreme Court decision in United States v. Rapanos.

Your memorandum articulates the view that Clean Water Act jurisdiction for Pima County activities hinges on demonstrating a significant nexus between the Colorado River and the waters directly affected by Pima County's activities. We recognize that Pima County needs to advance the legal analysis it believes most consistent with applicable law and regulations. However, we must caution you that EPA is not prepared to agree with this approach to Clean Water Act jurisdiction with regard to Pima County projects.

As Pima County projects work through the regulatory process, we hope that we can work effectively, in partnership with the State of Arizona and the U.S. Army Corps of Engineers to provide clear and consistent guidance as to how to proceed with Clean Water Act permitting in Arizona. If you have any questions as to EPA's views in this matter, please have your counsel contact Laurie Kermish at (415) 972-3917.

Sincerely,

  
Alexis Strauss, Director  
Water Division